

MINUTES

**MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON LOCAL GOVERNMENT

Call to Order: By **CHAIRMAN JOHN C. BOHLINGER**, on March 20, 2003
at 5:20 P.M., in Room 335 Capitol.

ROLL CALL

Members Present:

Sen. John C. Bohlinger, Chairman (R)
Sen. John Esp, Vice Chairman (R)
Sen. Jerry W. Black (R)
Sen. Brent R. Cromley (D)
Sen. Jim Elliott (D)
Sen. Kelly Gebhardt (R)
Sen. Bill Glaser (R)
Sen. Carolyn Squires (D)
Sen. Mike Wheat (D)

Members Excused: Sen. Rick Laible (R)
Sen. Jeff Mangan (D)

Members Absent: None.

Staff Present: Leanne Kurtz, Legislative Branch
Phoebe Olson, Committee Secretary

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted: HB 712, 3/11/2003
Executive Action:

HEARING ON HB 712

Sponsor: REPRESENTATIVE JOHN SINRUD, HD 31, Bozeman

Proponents:

Mark Evans, Southwest Montana Building Industry Association
Roger Halver, MT Association of Realtors
Art Wittich, Southwest Montana Building Industry Association
Don Allen, Western Environmental Trade Association
Curt Chisholm, MT Building Industry Association
Carl Schweitzer, Bozeman Chamber of Commerce

Opponents:

Tim Davis, MT Smart Growth Coalition
Marty Lambert, Gallatin County Attorney
Joe Mazurek, City of Great Falls
Linda Stoll, MT Association of Planners
Alec Hansen, League of Cities and Towns
Clark Johnson, Bozeman City Manager
Harold Blattie, MT Association of Counties
Jani McCall, City of Billings
Tom Judge, Teamster Local 190, MT Chapter of the Sierra Club
Dick Thweatt, Plan Helena

Opening Statement by Sponsor:

REPRESENTATIVE JOHN SINRUD, HD 31, Bozeman said HB 712 would create a vested property right for property owners, once they submit a project unto a municipality and or county/city government. He said once the application was completed and submitted for approval and city review, all the laws that exist at the specific time stay with that project. He said on page 1, line 20 the establishment of the vested right would promote the goals specified in a section in a matter consistent with article 2, Section 317 and Section 29 of the State Constitution. He maintained that as people were going through the process, the rules were changing in the middle of the approval. He said these changes seemed to be made on the whims of board members and believed that was unfair. He said planning should happen proactively not reactively. He asked them to look at page 3, section 3, subsection 3. He said this would allow people the right to know what was required of them prior to submittal, so they could know the costs involved. He submitted two amendments **EXHIBIT (los59a01)** and a letter from Greg Petesch. **EXHIBIT (los59a02)**

Proponents' Testimony:

Mark Evans, Southwest Montana Building Industry Association submitted written testimony and a fact sheet. **EXHIBIT(los59a03)**

Roger Halver, MT Association of Realtors said they were in support of the bill. He asked them to go back to their childhood. He explained this bill was like a game of baseball where the kid that brought the bat or ball, ended the game and went home when he didn't like the rules. He said the planners have ample time to decide the rules. He said this was common sense. When you submit a plan based on the rules in effect at that time, you should expect those rules not to change. He said for that reason he would ask the committee for their support.

Art Wittich, Bozeman Attorney submitted written testimony. **EXHIBIT(los59a04)**

Don Allen, Western Environmental Trade Association said since it's beginning in 1976 (WETA) has always been a champion of private property rights. They believed this bill strengthened those rights in terms of how it was applied. He said rules can be changed over time if they are thought out, and have input from all the effected parties. He said no matter what you were talking about, it was important to have certainty, so everyone was playing under the rules they start out with. He said this did not prevent the changing of the rules, but that it was not fair to change the rules in the middle of the game. He reiterated they were in strong support of the bill.

Curt Chisholm, MT Building Industry Association said they wanted to be on record in support of the bill.

Carl Schweitzer, Bozeman Chamber of Commerce said they were in support of the bill. He agreed that when the rules are established, and major financial decisions are based on those rules, it is not fair to change them.

Opponents' Testimony:

Tim Davis, MT Smart Growth Coalition said this bill could create a legal mess. He said this bill was giving a vested right as soon as an application was submitted. He offered the American Planning Association models for vested rights. **EXHIBIT(los59a05)** He also submitted testimony from John Horwich. **EXHIBIT(los59a06)**

Marty Lambert, Gallatin County Attorney said the first thing he wanted to talk about was Section 73-3-501. He said subsection 2 stated "Review and approval or disapproval of a subdivision under this chapter may only occur under those regulations in effect at the time an application for approval of a preliminary plat or for an extension under 76-3-610 is submitted to the governing body." He maintained half of what this bill was seeking to address was already in law, and had been there since 1995. He referenced case law, "Kiley Construction v City of Red Lodge" decided November 1, 2002. He said one of the issues was that Red Lodge changed the rules in the middle of the game. The Supreme Court said in paragraph 100 "here an explicit provision of the subdivision and platting act provided that review and approval or disapproval of a subdivision may occur only under those regulation in effect at the time an application for approval is submitted to the governing body." They concluded that the district court did not err in excluding the 1997 development code as evidence of local zoning regulations. He maintained the court upheld the law. He said there was no question that half of this bill was already in law and had been upheld by the Montana Supreme Court. He said all the concerns of the proponents would be taken care of in section 3(3) without going in to the vested right language or having three pages of statutory definitions, or matters that would simply be subject to litigation. He said he had a political concern as well. He wondered if these vested rights were so important, why would developers in the county be treated differently than those in the city. He did not think legislation was the way to deal with this problem. He said he opposed the bill and thanked the committee for their time.

Joe Mazurek, City of Great Falls agreed with previous testimony. He also pointed out a decision in 1987 "Mogan v. City of Harlem." The case is explained in Alec Hansen's written testimony(see exhibit 7). He said taking the suggestion about the language of section 3(3) would do exactly what the proponents wanted and that would be acceptable. He encouraged the committee not to enact the bill.

Linda Stoll, MT Association of Planners said her association had a real problem with the vested rights taking effect at the time an application was submitted. She maintained that the top of page 3, starting on line 2, as she understood that to read an applicant could refuse to submit additional information necessary to the application and still have vested rights. She asked the committee to take a close look at that. She said the problem with the rest of the bill was it was silent on what happened if the application was denied. She asked the committee to look at the bill and she hoped they would decide not to pass it.

Alec Hansen, League of Cities and Towns said they opposed the bill. He said the subdivision law was clear and he gave a copy to the committee. He included a memorandum that explained the court case that Joe Mazurek had discussed. **EXHIBIT(los59a07)** He hoped the committee would not pass the bill.

Clark Johnson, Bozeman City Manager said he was concerned about the equal protection issue. He did not know why it was fair that the county got to change the rules in midstream. He asked the committee to look at MCA 76-2-306. He said it was called the nasty stuff protection act if this bill passed. He maintained 76-2-306 allowed a community to adopt an urgency measure prohibiting any uses that may be in conflict with a contemplated zoning proposal which the legislative body is considering or studying or intends to study within a reasonable time. If there is a vested right under the rules that were in place it would be possible for bars, casino's, strip joints, head shops, to open across from a school because of a poor zoning decision. He said another unintended consequence was it could be the no growth tool of the century. He said if a commission swung far to the no growth side, they could take out all the gray items, and put you in a box, so if you don't comply with exactly what was written in the zone code, there would be a basis for denial. He said he had seen commissions that would go that far. He said the other unintended consequence was that public input was muted. Testimony from the public would not matter because the person had a vested right.

Harold Blattie, MT Association of Counties said he rose in opposition of the bill. The amendment did go along way to taking care of their objections, but they too were concerned about unintended consequences. He distributed a bill with suggested changes. **EXHIBIT(los59a08)**

Jani McCall, City of Billings said that vested property rights based on application made no sense. She said putting the restrictions on municipalities and not counties was totally and completely unfair. They thought it was bad policy, and strongly opposed the bill.

Tom Judge, Teamster Local 190, MT Chapter of the Sierra Club, MT Audubon, said their concerns were expressed very well by people who had testified already. He asked the committee not to support the bill.

Dick Thweatt, Plan Helena submitted written testimony.
EXHIBIT(los59a09)

{Tape: 2; Side: A}

Questions from Committee Members and Responses:

SENATOR JOHN ESP asked **Art Wittich** if the laws **Mr. Thweatt** spoke about in Ohio and other places, he as about it applicability in Montana.

Art Wittich said he litigated cases in Montana that this law would have prevented. He said he laughed when he heard this law would create litigation. He said there was a problem right now with cities accepting vested rights. He said the case law that had been cited in testimony dealt with subdivisions, and this was not a subdivision bill. He said this would deal with someone who bought a piece of the subdivided property and then wanted to build something on it. He asked the committee to note that in the codifying instructions the bill was not under the subdivision act in Title 76, but under Title 7. He maintained there was not an equal protection problem with the counties and cities because the cities issued building permits and the counties did not.

SENATOR ESP said if you looked at the law you had to give at least 7 days to put in emergency ordinances. He asked if that section of law would apply at all in the cases he was talking about.

Art Wittich said that code site had been used by the city of Bozeman and he did not think it would be effected by this bill. This bill had an exception for public safety, and he believed people could still oppose a project.

SENATOR ESP asked about the top of page three where it talks about the missing information. He asked what the intent of that was.

Art Wittich said the decision needed to be made on the existing rules. If the applicant does not want to change the application it could be denied.

SENATOR ESP asked if you had submitted an incomplete application and between the time you did that and submitted the information to make the application complete the rules were changed, would you be under the old rules or the new rules.

Art Wittickh said they could deny the application under the rules that existed at the time the application was submitted.

SENATOR CROMLEY asked **Mr. Allen** the logic of not including counties in the bill.

Don Allen said he was not sure what the logic was. He thought the best explanation he heard was that the counties don't do zoning.

SENATOR CROMLEY asked if he was familiar with the case Town Pump v. Board of Adjustment, and was it true that those rascals down the street were giving them conflicting decisions again.

Joe Mazurek said not entirely. In the Town Pump case they had made an application for a zoning variance. In the middle of the process the city changed the rules applicable to establishments that serve alcoholic beverages. The process continued on and Town Pump was denied on the new regulations. The Supreme Court ruled for the city only because Town Pump never raised the issue that they should have been governed by the original set of rules. Town Pump probably would have won their case had they not failed to raise the issue.

SENATOR BILL GLASER said he was looking on page 4 of the bill, where it talked about fire and electrical codes. He said that was very vague. He wondered if anyone through the legislative process had raised that concern.

Art Wittich said he did not think that issue had been brought up.

SENATOR GLASER said this was a broad bill. He said it dealt with anything you could build at a specific site. He asked if anything was mentioned about Life Safety 101 that applies to nursing homes and hospitals.

Art Wittich replied he did not think so.

SENATOR GLASER said Life Safety 101 is the only code that makes it a requirement that you improve the building when the code changes. That's why hospitals and nursing homes are always changing their buildings. He said it bothered him a little that wasn't considered.

SENATOR RICK LAIBLE asked **Mr. Wittich** if this did not apply in the county because it did not apply to subdivisions. What prompted this bill.

Art Wittich said counties were not exempt because it dealt with subdivisions, because cities can subdivide land as well. The counties were exempt from the bill because they do not review sight plans and issue permits, cities do. He explained why the bill was there.

SENATOR LAIBLE he asked about the word "completed" as opposed to "complete".

Art Wittich said he thought those words were interchangeable.

SENATOR GEBHARDT said he has some of the same concerns as Senator Glaser. He said one thing they could work on was on page 3, line 10, the two year issue, probably needed something that said unless state or federal regulations superceded.

REPRESENTATIVE SINRUD replied he would look at that.

Closing by Sponsor:

REPRESENTATIVE SINRUD said this was an excellent hearing. He said this did not apply to counties because they do not issue building permits. He reiterated this was not looking at subdivision regulations. He disagreed with Mr. Johnson on the nasty stuff clause. He said zoning laws were very well defined. He said they didn't want the bill passed because it puts everything on the table. He said he had never seen public input on a specific sight, he said he had seen it zoning. He said the want everything in law to be true. The were looking for certainty for business's and home owners. He maintained the rules should not be changed mid stream. He said it should be put down in rules what needs to be done, and get on with business.

ADJOURNMENT

Adjournment: 6:50 P.M.

SEN. JOHN C. BOHLINGER, Chairman

PHOEBE OLSON, Secretary

JB/PO

EXHIBIT (los59aad)